

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 MAYRA JIMENEZ-PACHECO,

4 Petitioner

5 v.

6 UNITED STATES OF AMERICA,

7 Respondent

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10 CIVIL 12-1648 (DRD)
11 (CRIMINAL 10-335 (DRD))

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13 MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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15 I. PROCEDURAL HISTORY

16 Petitioner, formerly a uniformed member of the Police of Puerto Rico, is one
17 of many former police officers who have had second thoughts about entering into
18 favorable plea agreements to serious drug and weapons charges, receiving the
19 benefit of such agreements at the time of sentencing, and then seeking federal
20 collateral review based on fairly meritless claims.¹ A short history of the criminal
21 case follows.

22 Petitioner Mayra Jimenez-Pacheco was indicted on September 16, 2010 in
23 three counts of a 16-count indictment in which five other defendants, also law
24 enforcement officers, were also indicted in a reverse sting operation. The
25 defendants were all uniformed members of the Police of Puerto Rico².

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¹See e.g. Ortiz-Muniz v. U.S., 2015 WL 1623021 (D.P.R. April 13, 2015);
27 Bracero v. U.S., 2015 WL 1098637 (D.P.R. March 11, 2015).

28 ²The involvement of police officers in reverse sting drug conspiracies
29 does not raise eyebrows in this district. See United States v. Diaz-Castro, 752

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4 Petitioner was charged in Count Ten in that beginning on or about January
5 12, 2010 and up and including January 14, 2010, in the District of Puerto Rico and
6 elsewhere within the jurisdiction of this court, she and Raphael Urena Rivera did
7 knowingly and intentionally combine, conspire, confederate, and agree together
8 with each other and others, both known and unknown to the Grand Jury, to
9 commit an offense against the United States, that is, to possess with intent to
10 distribute five kilograms or more of a mixture or substance containing a detectable
11 amount of cocaine, a Schedule II Narcotic Drug Controlled Substance. All in
12 violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(A)(ii)(II) and 846. (Criminal No. 10-
13 0335 (DRD), Docket No. 3). Count Eleven of the indictment is the corresponding
14 substantive charge under 18 U.S.C. § 2 and 21 U.S.C. § 841 (a)(1). Count Eleven
15 charges these two defendants with violating the corresponding aiding and abetting
16 statute, 18 U.S.C. § 2 in that they aided and abetted each other in their attempt
17 to possess with the intent to distribute cocaine on January 14, 2010. Count
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20 F.3d 101, 104-05 (1st Cir. 2014) ("Operation Guard Shack"); e.g. United States
21 v. Delgado-Marrero, 744 F.3d 167, 172 n. 1 (1st Cir. 2014) ("Operation Guard
22 Shack" which yielded 26 indictments against 89 law enforcement officers in a
23 26-month period); United States v. Bristol-Martir, 570 F.3d 29 (1st Cir. 2009);
24 United States v. Caraballo-Rodriguez, 480 F.3d 62 (1st Cir. 2007); United
25 States v. Sanchez-Berrios, 424 F.3d 65 (1st Cir. 2005); United States v.
26 Serrano-Beauvaix, 400 F.3d 50 (1st Cir. 2005); United States v. Flecha-
27 Maldonado, 373 F.3d 170 (1st Cir. 2004); also see United States v. Gonzalez-
28 Perez, 778 F.3d 3, 8 (1st Cir. 2015); United States v. Nieves-Velez, 28 F.
Supp. 3d 131, 132 (D.P.R. 2014).

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Twelve charges petitioner with a firearms offense committed the same date, that is with knowingly possessing a firearm in furtherance of a drug trafficking crime as defined in Title 18, U.S.C. § 924(c)(2), that is, a violation of Title 21, U.S.C. §§ 841(a)(1) and 846, involving a conspiracy and attempt to possess with intent to distribute five kilograms or more a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Drug Controlled Substance, as charged in Counts Ten and Eleven of the Indictment herein, an offense, either of which may be prosecuted in a court of the United States, all in violation of 18 U.S.C. Section 924(c)(1)(A) and 2³.

Because of the particular circumstances of the case, all defendants were appointed counsel prior to the initial appearances. All defendants were temporarily detained at their initial appearance on October 6, 2010 and all defendants were detained pending trial, including petitioner. (Criminal No. 10-0335 (DRD), Docket Nos. 29-33, 36). In the U.S. Magistrate Judge's Order of Detention, the following was noted:

In addition to the evidence proffered as to the nature of the offense, the fact this defendant was a law enforcement [officer] at the time of

³Policemen and women who are charged in this court with protecting drug transactions are typically charged in this fashion. See e.g. United States v. Delgado-Marrero, 744 F.3d at 175; United States v. Diaz-Diaz, 433 F.3d 128, 131-32 (1st Cir. 2005); United States v. Sanchez-Berrios, 424 F.3d at 72; Reyes-Velazquez v. United States, 2012 WL 4483679 (D.P.R. March 5, 2012); cf. United States v. Cortes-Caban, 691 F.3d 1 (1st Cir. 2012).

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4 the commission of the offense charged and the presumption of the
5 charges, evidence of video recorded illegal activities shows, this
6 defendant's participation in providing escort to the presumed
7 controlled substances and the payment of monies to this defendant
8 for the security provided to the presumed narcotic dealers, while
9 defendant was armed. For this reason, defendant faces the additional
10 charge of firearms in furtherance of a drug trafficking activity in
11 violation of Title 18, United States Code, Section 924(c). There was
strong evidence in support of government's request for detention for
being a danger to the community upon participating in a drug
trafficking conspiracy and the firearm charge in furtherance of a drug
trafficking offense.

12 (Criminal No. 10-0335 (DRD), Docket No. 32 at 2-3).

13 The findings as to other defendants were similar, almost identical. (Criminal
14 No. 10-0335 (DRD), Docket Nos. 29-31, 33, 36). See Ortiz-Muniz v. U.S., 2015
15 WL 1623021 at *3; Bracero v. U.S., 2015 WL 1098637 at *2. After initially
16 pleading not guilty to the charges on October 12, 2010, petitioner moved to
17 change her plea on February 25, 2011. (Criminal No. 10-0335 (DRD), Docket No.
18 121). Petitioner entered a guilty plea on March 30, 2011 as to two of three counts
19 in which she was charged, that is Counts Ten and Twelve. (Criminal No. 10-0335
20 (DRD), Docket No. 150). The terms of the plea agreement called for holding
21 petitioner accountable for at least 400 grams but less than 500 grams of cocaine,
22 thus establishing a base offense level of 24, pursuant to U. S. S. G. § 2D1.1, and
23 a 3-level reduction for acceptance of responsibility, pursuant to U. S. S. G. §
24 3E1.1(a). (Criminal No. 10-0335 (DRD), Docket No. 146 at 5). The parties agreed
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4 to a recommendation above the higher end of the applicable guideline, which was
5 37-46 months. This would mean 108 months (48 months for Count Ten and 60
6 months for Count Twelve to run consecutively to each other, assuming a Criminal
7 History Category of I. Count Twelve relates to the indictment and petitioner's
8 pleading guilty to "possess[ing] a firearm in furtherance of a drug trafficking
9 crime". (Criminal No. 10-0335 (DRD), Docket No. 146 at 2).

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11 Petitioner was sentence on August 5, 2011 to 46 months as to the narcotics
12 offense (at the higher end of the applicable sentencing guideline), to run
13 consecutively to the 60 months provided for in the firearms offense. (Criminal No.
14 10-0335 (DRD), Docket Nos. 198, 199). The remaining count was then
15 dismissed, as provided for in the plea agreement. Petitioner filed an untimely
16 notice of appeal on February 8, 2012. (Criminal No. 10-0335 (DRD), Docket No.
17 227). The court found that the waiver of appeal clause in the plea agreement was
18 effective based upon the sentence but found the notice of appeal untimely. The
19 parties did not dispute that. The court of appeals did note that petitioner could
20 still exercise her rights under 28 U.S.C. § 2255 which they noted is subject to a
21 one-year period of limitation. 28 U.S.C. § 2255(f). (Criminal No. 10-0335 (DRD),
22 Docket No. 238).

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24 II. MOTION TO VACATE, SET ASIDE OR VACATE SENTENCE
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4 This matter is before the court on petitioner Mayra Jimenez-Pacheco's¹
5 timely motion to vacate, set aside or correct her sentence under 28 U.S.C. §
6 2255, filed on August 9, 2012. (Docket No. 1.) Petitioner argues the following
7 grounds for relief: 1) the weapon that she carried which appears in the only video
8 is her regulation firearm which she carried all the time, and with which she had
9 no intention of threatening anyone. Nor did she have the slightest intention of
10 using the same. Nor did she threaten anyone with it; 2) The sentence imposed
11 upon her in the firearms count is more than is contemplated by the law. She
12 complains she received the maximum sentence; 3) Offense Level 21 in the
13 cocaine charge begins at 37 months and ends at 46 months, and for a first
14 offender, she received the maximum within the guideline when she could have
15 received the minimum. (Docket No. 1 at 10).

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17 On January 10, 2013, in response to the section 2255 motion, the
18 government notes the obvious mistakes in petitioner's argument. Petitioner
19 received the lowest possible sentence for the firearms count, 60 months, for
20 carrying the same, not for threatening anyone with it or doing anything other than
21 carrying it. And she received a sentence below the one agreed to in the plea
22 agreement, within the sentencing guideline which triggered a waiver of appeal.
23 In other words, she got a better deal than the one she bargained for. The
24 government refers to the transcript of the proceedings which reflects that
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4 petitioner was aware of the exposure and agreed to the same. The firearms count
5 provides for a maximum penalty of LIFE IMPRISONMENT, not 60 months which
6 is what she received.
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8 Because petitioner appears pro se, her pleadings are considered more
9 liberally, however inartfully or opaquely pleaded, than those penned and filed by
10 an attorney. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200
11 (2007); Aguasvivas-Castillo v. U.S., 49 F. Supp. 3d 167 (D.P.R. 2014); Proverb
12 v. O'Mara, 2009 WL 368617 at *1 (D.N.H. Feb. 13, 2009). Notwithstanding such
13 license, petitioner's pro se status does not excuse her from complying with both
14 procedural and substantive law. See Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st
15 Cir. 1997); Acosta-Andujar v. U.S., 2014 WL 7915315 at *3 (D.P.R. February 18,
16 2014).

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18 Having considered petitioner's arguments and the government's response,
19 and for the reasons set forth below, I recommend that petitioner's motion to
20 vacate, set aside, or correct sentence be DENIED without evidentiary hearing.
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III. DISCUSSION

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24 Under section 28 U.S.C. § 2255, a federal prisoner may move for post
25 conviction relief if:

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27 the sentence was imposed in violation of the Constitution
28 or laws of the United States, or that the court was
without jurisdiction to impose such sentence, or that the

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 4 sentence was in excess of the maximum authorized by
 5 law, or is otherwise subject to collateral attack. . . .

6 28 U.S.C. § 2255(a); Hill v. United States, 368 U.S. 424, 426-27, 82 S. Ct. 468
 7 (1962); David v. United States, 134 F.3d 470, 474 (1st Cir. 1998); Acevedo-
 8 Hernandez v. U.S., 2015 WL 859548 at *6 (D.P.R. February 27, 2015).

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 10 "When a criminal defendant has solemnly admitted in open court that
 11 [s]he is in fact guilty of the offense with which [s]he is charged, [s]he may not
 12 thereafter raise independent claims relating to the deprivation of constitutional
 13 rights that occurred prior to the entry of the guilty plea." Lefkowitz v.
 14 Newsome, 420 U.S. 283, 288, 95 S. Ct. 886 (1975) (quoting Tollett v.
 15 Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602 (1973)); see Perocier-Morales
 16 v. United States, 887 F. Supp. 2d 399, 417 (D.P.R. 2012); Nieves-Ramos v.
 17 United States, 430 F. Supp. 2d at 43; Caraballo Terán v. United States, 975 F.
 18 Supp. 129, 134 (D.P.R. 1997). This is exactly what petitioner is doing here.

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 21 There was a waiver of appeal clause in the plea agreement. The
 22 sentencing court favored petitioner. Substantively the inquiry stops here.
 23 Petitioner's proffered grounds for relief do not fall under 28 U.S.C. § 2255 (a).

24 IV. PROCEDURAL DEFAULT

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 26 With the briefest of analyses as background, I address the matter of
 27 procedural default.

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4 A significant bar on habeas corpus relief is imposed when a prisoner
5 did not raise claims at trial or on direct review. In such cases, a
6 court may hear those claims for the first time on habeas corpus
7 review only if the petitioner has "cause" for having procedurally
8 defaulted his claims, and if the petitioner suffered "actual prejudice"
9 from the error of which [s]he complains.

10 United States v. Sampson, 820 F. Supp.2d 202, 220 (D.Mass. 2011),
11 citing Owens v. United States, 483 F.3d 48, 56 (1st Cir. 2007), also citing Oakes
12 v. United States, 400 F.3d 92, 95 (1st Cir. 2005) ("If a federal habeas petitioner
13 challenges his conviction or sentence on a ground that he did not advance on
14 direct appeal, his claim is deemed procedurally defaulted.") To obtain
15 collateral relief in this case, petitioner must show cause excusing her double
16 procedural default and actual prejudice resulting from the errors she is
17 complaining about. See United States v. Frady, 456 U.S. 152, 167-68, 102 S.
18 Ct. 1584, 1594 (1982). She has in fact shown no prejudice at all. Indeed she
19 was the recipient of a merciful sentence, with the scales of justice tipping
20 slightly in her favor. That said, petitioner's argument suffers from double
21 procedural default, that is, failure to initially attack the validity of the basis for
22 conviction by not moving to withdraw her guilty plea at the trial level, and
23 failure to file a timely notice of appeal after sentencing. See United States v.
24 Frady, 456 U.S. at 167-68, 102 S. Ct. at 1594.

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4 A guilty plea serves as a stipulation that no proof by the prosecution is
5 further needed, since it supplies both evidence and verdict, thus ending the
6 controversy. Boykin v. Alabama, 395 U.S. 238, 242 n. 4, 89 S. Ct. 1709
7 (1969). See Perez v. United States, 2007 WL 1830510 at *5 (D.P.R. June 25,
8 2007). The guilty plea is an admission that she committed the crime charged
9 against her. United States v. Broce, 488 U.S. 563, 570, 109 S. Ct. 757 (1989),
10 cited in United States v. Correa-Manso, 2006 WL 1514364 at *3 (D.P.R. May
11 30, 2006). Petitioner protected sham cocaine thinking it was real cocaine. She
12 carried her service firearm when she did that. And she and her co-defendant
13 Rafael Urena-Rivera were each paid \$2,000 for their protective services.
14 (Criminal No. 10-335 (DRD), Docket No. 146 at 13). She could have received a
15 sentence of 20 years as to Count Ten and life imprisonment in Count Twelve,
16 and she was clearly aware of her exposure. Furthermore her pleadings reflect a
17 degree of ignorance in relation to her case that can only be described as wilful
18 since she was a law enforcement officer at the time of the offense and aware of
19 her rights under the law to a greater degree than a member of the elementary
20 mass. The dialogue at the change of plea hearing only reaffirms that
21 conclusion. This further reinforces the conclusion that the motion lacks merit.

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27 V. CONCLUSION

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4 Habeas corpus is an extraordinary remedy and is granted sparingly.⁴

5 Direct review is more defendant-friendly than post-judgment review. United
 6 States v. George, 676 F.3d 249, 258 (1st Cir. 2012), citing United States v.
 7 Frady, 456 U.S. at 165-66, 102 S. Ct. at 1593. Thus it is in this case. See Ellis
 8 v. United States, 313 F.3d 636, 644-45 (1st Cir. 2002). This case does not
 9 invite an extraordinary remedy. It does not invite an ordinary remedy because
 10 it does not involve the violation of any rights at all. It is another example of the
 11 writ's commonplace use as an additional appeal. In short, the government
 12 complied with its part of the plea agreement, the court tempered justice with
 13 mercy, and petitioner somehow feels that she has an entitlement to additional
 14 judicial munificence. She is simply mistaken.

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16 In view of the above, I find that petitioner Mayra Jimenez-Pacheco's
 17 motion is meritless. Indeed, petitioner filed a motion seeking reduction of her
 18 sentence under U. S. S. G. Amendment 782 on November 7, 2014. (Criminal
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22 ⁴The nature of the extraordinary writ is internationally recognized by
 23 scholars. See Antonio R. Bautista, *Habeas Corpus as a Post-Conviction*
 24 *Remedy*, Vol. 75 Philippine L. J. 553, 564-55 (2001); Cristina Fuertes-Planas
 25 Aleix, *Habeas Corpus*, No. 4 Rev. Elec. de Metodología e Historia del Derecho
 26 (www.ucm.es/info/kinesis/habeas20%corpus.htm) (Universidad Complutense
 27 de Madrid, 2007); Humberto Nogueira Alcala, *El Habeas Corpus o Recurso de*
Amparo en Chile, No. 102 Rev. De Estudios Políticos (Nueva Epoca) 193, 203
 28 (Oct.-Dec. 1998); H.F. Rawlings, *Habeas Corpus and Preventive Detention in*
Singapore and Malaysia, Vol. 25 Malaya L. Rev. 324-350 (1983). See Landron-
Class v. U.S., ___ F. Supp. 3d ___, 2015 WL 629301 at *4 (D.P.R. February 11,
 2015).

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4 No. 10-335 (DRD), Docket No. 250). I issued a favorable report and
5 recommendation on Christmas Day 2014 and the parties subsequently
6 stipulated a sentence reduction to 37 months in the drug count. (Criminal No.
7 10-335 (DRD), Docket No. 250). Ultimately, again, petitioner received an even
8 better sentence. Cf. United States v. Nieves-Velez, 28 F. Supp. 3d at 133-34.

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10 Accordingly, it is my recommendation that petitioner's motion to vacate,
11 set aside or correct her sentence under 28 U.S.C. § 2255 (Docket No. 1) be
12 DENIED. No evidentiary hearing is warranted because the motion does not
13 pass muster under 28 U.S.C. § 2255 (a).

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15 Based upon the above, I also recommend that no certificate of
16 appealability be issued, because there is no substantial showing of the denial of
17 a constitutional right within the meaning of Title 28 U.S.C. § 2253(c)(2). Miller-
18 El v. Cockrell, 537 U.S. 322, 336-38, 123 S. Ct. 1029 (2003); Slack v.
19 McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000); Lassalle-Velazquez v.
20 United States, 948 F. Supp. 2d 188, 193 (D.P.R. 2013).

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22 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico,
23 any party who objects to this report and recommendation must file a written
24 objection thereto with the Clerk of this Court within fourteen (14) days of the
25 party's receipt of this report and recommendation. The written objections must
26 specifically identify the portion of the recommendation, or report to which
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4 objection is made and the basis for such objections. Failure to comply with this
5 rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140, 155
6 (1985); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-
7 Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988);
8 Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott
9 v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d
10 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d
11 603 (1st Cir. 1980).
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14 In San Juan Puerto Rico this 8th day of May, 2015.
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16 S/ JUSTO ARENAS
17 United States Magistrate Judge
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